No. 89-1817

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

COUNTY OF RIVERSIDE, and COIS BYRD,
SHERIFFS OF RIVERSIDE COUNTY,
Petitioners,

VS.

DONALD LEE MCLAUGHLIN, et al.,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit

BRIEF FOR THE RESPONDENTS

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On Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit

BRIEF FOR THE RESPONDENTS

STATEMENT OF THE CASE

A. Facts Relating To Standing.

The Second Amended Complaint (the operative pleading) was filed on July 25, 1988.[1] (2 J.A. 337.) That complaint named Johnny E. James,[2] Diana Ray Simon, and Michael Scott Hyde as respondents (hereinafter referred to as "plaintiffs"), individually and as class representatives. It alleged that each of the plaintiffs had

[1]Record references in this form are to the volume (1 or 2) and the page number[s] of the Joint Appendix.

[2]This plaintiff was originally named in the Second Amended Complaint as "Johnny E. Jones." (1 J.A. 2) On August 9, 1988, by court order, the name was corrected to "Johnny E. James." (2 J.A. 337).

been arrested without a warrant, and had received neither prompt probable cause nor bail hearings, and was still in custody. (1 J.A. 3.) The complaint further alleged that the petitioners (hereinafter referred to as "defendants" or "the County") "engaged and conspired in the illegal conduct herein mentioned to the injury of plaintiffs, and deprived the plaintiffs of the rights, privileges and immunities secured to plaintiffs by the First, Fourth, Eighth and Fourteenth Amendments to the Constitution of the United States and the laws of the United States, pursuant to the practice and policy of defendant County." (1 J.A. 4-5.)

The complaint also alleged that the Riverside County Jail was severely overcrowded, that plaintiffs were often forced to sleep on the floor of "triple-bunked" cells, were denied adequate access to counsel and adequate visitation, and were subjected to excessive force by guards. (1 J.A. 5) In addition it was alleged that the deprivations suffered by the plaintiffs were the result of ongoing practices of defendants. The complaint sought a halt to the excessive detention of warrantless arrestees under the conditions described above. (1 J.A. 5.)

The class on whose behalf the complaint was filed consists "of all present and future prisoners in the Riverside County Jail including those pre-trial detainees arrested without warrants and held in the Riverside County Jail from August 1, 1987 to the present, and all such future detainees who have been or may be denied prompt probable cause, bail or arraignment hearings." It was alleged that the named plaintiffs will fairly and adequately protect the interests of the class. (1 J.A. 7.) The complaint's prayer simply asks for "prompt probable cause, bail and arraignment hearings." (1 J.A. 7.)

Previously on November 20, 1987 defendants had filed a motion to dismiss the First Amended Complaint; that motion was taken off calendar on August 11, 1988 after the Second Amended Complaint was accepted and filed (2 J.A. 337). Defendants' answer to the Second Amended Complaint was filed on August 23, 1988. (2 J.A. 337.) On October 13, 1987, plaintiffs had filed a motion to certify the class which was pending when the Second Amended Complaint and Answer thereto were filed. For various reasons the court continued the motion on October 29, 1987, November 10, 1987, (until 30 days after the court ruled on defendants' motion to dismiss) and September 10, 1988. (J.A. 335-338) On November 15, 1988, the court ordered the class certified as described in the Second Amended Complaint. (2 J.A. 338.) Plaintiffs' Motion for Preliminary Injunction was filed on March 3, 1989. (1 J.A. 16.) The plaintiffs sought an injunction ordering that "all persons arrested without a warrant and detained in the custody of the Riverside County Jails, County of Riverside, California, shall, within thirty-six (36) hours of the time of the arrest, be taken before a judge, magistrate, court commissioner, or other authorized judicial officer, for a hearing on determination of probable cause for detention." (1 J.A. 21.) The preliminary injunction was granted on April 19, 1989, consistent with plaintiffs' moving papers. (2 J.A. 339.)

B. Facts Relating to Arraignment Process.

After a person is arrested and brought into the Riverside County Main Jail,[3] the arraignment "usually takes place on the last day for arraignment." (1 J.A. 82.) The

[3]The Riverside County Main Jail was originally rated by the Board of Corrections of the State of California to hold 357 prisoners. At the time of the injunction hearing there were only 416 beds in the prison, yet, there were over 650 prisoners in the facility. (2 J.A. 318)

arraignment process differs slightly between misdemeanors and felonies. For both, prisoners are collected and held within the chapel of the jail *en masse* prior to arraignment. Those charged with misdemeanors are arraigned via video camera connected from the jail to the courthouse at 10:30 a.m. every weekday except holidays. (1 J.A. 125.) No public defenders or other attorneys are present in the jail for misdemeanor arraignments. (1 J.A. 120-125.)[4] "Prior to arraignments, the persons in custody are shown a video presentation on the television screen which shows a judge of the municipal court who advises these persons of certain rights they have." (1 J.A. 125.) Near the conclusion of the video presentation, misdemeanor defendants are informed as follows: "Further, you have the right to have a hearing to determine whether there was probable cause for your arrest, *if you request one at the time of this hearing.*" (Emphasis added.) (1 J.A. 128.) After the video presentation, the judge takes the pleas. At a later date, the prisoners first come into contact with the public defender's office.[5] (1 J.A. 123, 128.)

Most of the prisoners who remain within the jail are charged with felonies (2 J.A. 299). They are arraigned at 1:30 p.m. each non-holiday week day. "A Deputy Public Defender is present with the defendant during felony

[4]According to the declarations of Judge Taylor, Presiding Judge of the Riverside Municipal Court (1 J.A. 121-124), and Lt. Peter Kiyasu of the Riverside County Sheriff's Department (1 J.A. 125-129), Public Defenders are only provided for felony arraignments. Contrary to the statements made in the Amicus Brief by the County of Riverside p. 8, there are no attorneys provided at misdemeanor arraignments.

[5]The misdemeanor charged prisoners are told in the video that: "If you have any other questions about your rights, you should ask your attorney when you appear in court and discuss your matter with your attorney." (1 J.A. 123, 128.)

arraignment." (1 J.A. 125.) In the final sentence of the felony video the prisoners are informed: "Finally, you have a right to have a hearing to determine whether there was probable cause for your arrest *within a reasonable time, at your request.*" (1 J.A. 124, 129.) (Emphasis added) This generally does not occur until ten (10) days after the arraignment at the preliminary hearing. (1 J.A. 123-124, 128-129, 2 J.A. 299.)[6]

C. Calculating Time Periods for Arraignment.

The County relies exclusively on the *arraignment* procedures to support its claim of compliance with *Gerstein*. There is no evidence indicating the actual procedure used to determine probable cause for arrest.

The County stipulated that "ordinarily the first appearance before a judge or commissioner of a person arrested without a warrant . . . in Riverside County, is at the arraignment." (1 J.A. 82.) It further stipulated that "if criminal charges have not been filed, the in-custody arrestee, without warrants or holds, is released at about 5:00 p.m. on the last day for arraignment. If criminal charges have been filed the arraignment takes place on the last day for arraignment." (1 J.A. 82.) The court below found that in "Riverside County the first judicial appearance of a prisoner arrested on a Thursday or Friday occurs the following week. If there is an intervening holiday as much as five (5) days of delay after arrest occurs." (2 J.A. 332.) No arraignments are held on Saturdays, Sundays or holidays (1 J.A. 120.)

Prisoners spend as much as 96 hours or more in custody before receiving any kind of hearing (and cer-

[6]The hearing referred to is the preliminary hearing which is a probable cause for detention hearing, not a probable cause for arrest. (See Arguments III-VII, *in/ra*).

tainly no probable cause for arrest hearing is ever held). (1 J.A. 27-63, 82-83.) If a person is arrested on Wednesday evening, he or she will not be *arraigned* until the following Monday, a period of over 100 hours. If the arrest should fall on a holiday weekend such as Thanksgiving, the detention period, prior to arraignment, would be seven days. (1 J.A. 27-63, 82-84, 2 J.A. 307-308, 315.)[7]

All of this only applies to arraignments. There are *no* times set for probable cause for arrest hearings. At the video-conducted arraignment hearing, prisoners are told that a person has a right to a hearing to determine whether there was probable cause for arrest. However, the prisoners must request the probable cause or bail hearing

[7]The chart accompanying Riverside County District Attorney Grover Trask's deposition reads as follows:

ARRESTED		MUST BE ARRAIGNED BY
SUNDAY:	Any time	5:00 P.M. Wednesday
MONDAY:	Before 5:00 P.M. (1700)	5:00 P.M. Wednesday
	5:01 P.M. (17:01) to Midnight (2400)	5:00 P.M. Thursday
TUESDAY:	Before 5:00 P.M.	5:00 P.M. Thursday
	5:01 P.M. to Midnight	5:00 P.M. Friday
WEDNESDAY:	Before 5:00 P.M.	5:00 P.M. Friday
	5:01 P.M. to Midnight	5:00 P.M. Monday
THURSDAY:	Before 5:00 P.M.	5:00 P.M. Monday
	5:01 P.M. to Midnight	5:00 P.M. Tuesday
FRIDAY:	Before 5:00 P.M.	5:00 P.M. Tuesday
	5:01 P.M. to Midnight	5:00 P.M. Wednesday
SATURDAY:	Any time	5:00 P.M. Wednesday

NOTE: If a legal holiday (a day when the courts are closed) occurs on the day of arrest, the day of arraignment, or on any day in between, the arraignment may be postponed one (1) additional day.

(1 J.A. 83-84, 2 J.A. 307-308.)

at the time of arraignment and it may be provided at some later unspecified date! (1 J.A.120-125.)

Thus, one *may* get a probable cause hearing on continued detention (as distinguished from probable cause for arrest), if one requests it, but it would then only be provided at the time of the preliminary hearing ten days after the arraignment and would be based on the entire investigative file.

The potential for the incarceration of innocent persons with no probable cause for arrest determination is substantial. A random survey indicated that of the total warrantless arrestee sample, *42% were released "no complaint" after four to six days in custody.* Of 16 warrantless arrestees eventually seen by a judge, 6% were seen by a judge in 3 days; 56% were seen by a judge in 4 days; 37% were seen by a judge in 5 days.[8] (1 J.A. 21-55.)

The County conducted its own survey. Of 46 warrantless felony arrestees who obtained release approximately 63.24% were held beyond 24 hours.[9] (2 J.A. 276-277.) Further, 16 of the 49 were released pursuant to Penal Code section 825, which means they spent at least 48 hours in jail and were released without receiving either a probable cause or arrest hearing or being arraigned. They were held solely based on the unreviewed officer's report. In computing these figures, the County did not count the 48 to 72 hours that would be added for either weekends or holidays. Once that is done, the County's survey is very similar to the plaintiffs' survey. The County admits that

[8]There is nothing in the record which would indicate that, on any of these occasions, a determination was made as to probable cause for arrest.

[9]This figure is reached by taking the number of warrantless felony arrestees (46) and dividing it by 29, the number of persons held over 24 hours.

"in nearly 90 percent of all cases in Riverside the procedures needed to complete arrest reports can be completed in 24 hours or less." Amicus Curiae Brief of Grover Trask, District Attorney, Riverside County, p. 16. The County desires a longer period in order to collect evidence on the remaining 10 percent, not because of any need to complete the administrative steps incident to arrest. *Id* at 16-17.

The District Court Judge, Richard Gadbois, had before him *Scott v. Gates*, Civ. No. 84-8647 (C.D.Cal., Oct. 3, 1988) on the identical issue. The ruling of Judge Gadbois in this case rested on his ruling in *Scott* together with the evidence in this record. (1 J.A. 22-23, 79-80, 117-119.) The procedure adopted by Orange County, in *Scott v. Gates*, includes a lawyer appointed as a judicial hearing officer to determine probable cause for arrest. (2 J.A. 161-162.) The hearings conducted by this judicial hearing officer are actually conducted at the county jail; one person was able to conduct 14,557 hearings within one year. (2 J.A. 168-169.) The review by this hearing officer resulted in a 9.1% release rate in 1988 because of lack of probable cause for arrest within less than 36 hours after the arrest. *Id.*

SUMMARY OF ARGUMENT

The judgment of the Ninth Circuit United States Court of Appeals should be affirmed by this Court for the following reasons:

A. Contrary to the County's Contentions, the Named Plaintiffs Had Standing to Prosecute this Action at the Time The Complaint Was Filed.

At the time the Second Amended Complaint was filed, the named Plaintiffs, arrested without a warrant, were each in custody pursuant to an official policy of Riverside County, and had not received a prompt judicial determination of probable cause for that arrest. Each of the named Plaintiffs was suffering injury from the ongoing violation of his right to a hearing relating to the constitutional right to liberty; the injury in question was one which was redressable by the court. The Article III requirement of a case or controversy was satisfied.

B. The Certified Class Had Standing At All Critical Stages.

Plaintiffs' action was certified as a class action, the class was comprised of all present and future detainees arrested without warrants who have been or may be denied prompt probable cause for arrest, bail or arraignment hearings. As in *Gerstein v. Pugh*, 420 U.S. 103, 110, n.11, 95 S.Ct. 854, 861, n.11 (1974), this is a continuing, inherently transitory class; the continuous existence of a class of persons suffering the deprivation of their constitutional rights is certain. Upon class certification, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by the named Plaintiffs. *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553 (1975).

The duly certified class had standing to prosecute this action; that standing is not forfeited because of the probable mootness of the named plaintiffs' claims. *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 100 S.Ct. 1202 (1980); *Sosna, supra.*

C. The Duly Certified Class Meets All Prerequisites For Injunctive Relief.

The plaintiff class is suffering, and will suffer in the future, irreparable harm because of the loss of the opportunity for a prompt judicial determination of the lawfulness of the arrest and consequent deprivation of the class member's liberty. The loss of liberty occasioned by the

lack of a prompt hearing occurs under jail conditions which are also violative of the rights of the plaintiff class. Additionally, as noted in *Gerstein v. Pugh* 420 U.S. 103, 114, 95 S.Ct. 859, 863 (1975), the unlawful pretrial confinement imperils jobs, interrupts sources of income, and impairs family relationships. The class is a continuing one, comprising future warrantless arrestees, Riverside County officials have stated they intend to continue to enforce the challenged policy against members of the class in the future. *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660 (1983) does not bar the right to injunctive relief here, because of significant factual differences.

There is no realistic, complete or adequate legal relief other than injunction. A civil suit for damages, does not benefit the class as a whole. The only way in which future members of the class can be protected is by eliminating the challenged official policy. This can be accomplished only by injunction. To deny standing to seek injunctive relief here is to permit a governmental wrong to go unredressed, in violation of the basic principles of our government.

D. The Ninth Circuit was correct in ruling that Riverside County's Practices Concerning Probable Cause for Arrest Hearings is Unconstitutional Under *Gerstein v. Pugh*.

1. The defendants confuse the issue of probable cause for arrest with probable cause for detention for trial. The defendants go to great lengths citing California law concerning arraignment and preliminary hearings procedures; however, these procedures, applicable to the arraignment process, provide no prompt probable cause hearing for arrest as mandated by this Court in *Gerstein v. Pugh*. Rather, they set up a mechanism by which, for

misdemeanors, a probable cause hearing may be requested which will be held at some later date, and a procedure for felonies that results in a probable cause for detention hearing held at some later date as part of the preliminary hearing process. These procedures do not comply with *Gerstein v. Pugh* and are irrelevant, in fact and law, to that decision.

2. *Gerstein v. Pugh* requires that there be a post arrest hearing to determine probable cause for arrest. The standard to be applied for the post arrest determination is the same as that to be applied to determine whether a person has been arrested upon probable cause. Riverside County takes away the probable cause for arrest hearing and combines it with the probable cause for detention hearing because they seek to bring into that hearing post arrest investigations conducted by themselves and other agencies, in order to, as they admit, attempt to establish "probable cause for arrest". This is the policy which *Gerstein v. Pugh* found to be unlawful.

3. The procedures of the County of Riverside offend the Fourth Amendment and due process because there is no hearing actually provided to the individual prisoners. At the felony and misdemeanor videotape arraignment prisoners are simply informed by a pre-recorded videotape that they have a right to a hearing which will be held at some unspecified time and date in the future, if they request it. No person is even available from whom to request the hearing. The nature of a post-arrest determination as to probable cause for arrest is such that there must be a time and a place when such a determination is actually made because the prisoner is detained and presumed innocent. The result is, as the County admits, that virtually every prisoner fails to demand a hearing and, thereby, automatically waives the right supposedly guaranteed by the Fourth Amendment and *Gerstein v. Pugh*.

4. The arraignment process is not prompt. The County admits that in 90% of the circumstances the procedures incident to arrest can be completed in less than 24 hours. The County also admits that the only reason it desires more time is to engage in post-arrest investigation in order to bolster the probable cause for the original arrest. *Gerstein v. Pugh* ruled that there has to be a prompt probable cause hearing within a "brief period" in order to determine probable cause for arrest. The standard applied is to examine the time necessary to complete the "administrative" steps incident to arrest. The County has made absolutely no showing that it takes more than 36 hours, and in fact has admitted that it can be done in 24 hours. There is no basis for the delay of two to 17 days that presently occurs within the system.

ARGUMENT

I. THE COUNTY'S CONTENTION THAT THE JUDGMENT SHOULD BE DISMISSED BECAUSE OF LACK OF STANDING IS DEVOID OF MERIT.

A. At The Time The Second Amended Complaint Was Filed, The Named Plaintiffs Had Article III Standing To Prosecute The Within Action.

The County's position is essentially that no prisoner would ever have standing to seek injunctive relief on behalf of either himself or a class to halt certain types of improper police practices. It has massive ramifications to the rights of those who are innocent of the charges against them and are improperly arrested and detained without probable cause. In their papers defendants misconstrue the issue of standing as analyzed by this Court in *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 95 (1983). In order to properly analyze the issue of standing, it is necessary to review the various aspects of standing as it affects this case.

The "threshold requirement," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 96 S.Ct. 1917 (1976), is summed up in the language of Article III of the United States Constitution as "a case or controversy." The gist of the question is,

> [W]hether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adversariness which sharpens the presentation of issues upon which the court is largely dependent for illumination of difficult constitutional questions.' [Citation omitted] ... When standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of *a particular issue* and not whether the issue itself is justiciable. (Emphasis added.) *Flast v. Cohen*, 392 U.S. 83, 96, 88 S.Ct. 1942 (1968).

In the case at bar, the allegations of the Second Amended Complaint (1 J.A. 2-7) show that plaintiffs, having been arrested without warrants, were in custody at the time of the filing of the Second Amended Complaint and are proper parties to request an adjudication of their right to a prompt determination of probable cause for their arrest. The complaint alleges that each of them suffered injury — the denial of a prompt probable cause for arrest determination and the resulting impact on their liberty (1 J.A. 3) — because of the putatively illegal policy of Riverside County. (1 J.A. 4-5.) Their injury is redressable in court because the court has the power to decide whether, at the time of the filing of the Second Amended Complaint, plaintiffs were being denied a probable cause for arrest hearing pursuant to the County's

policy, whether the County's policy is illegal and, if so, whether to enjoin Riverside County from continuing to enforce it. *Simon, supra.*

The allegations of the Second Amended Complaint satisfy the "threshold" Article III requirement of a case or controversy. The record below contains no evidence submitted by the County to contradict either the facts pleaded in the Second Amended Complaint concerning the incarceration of the named plaintiffs or the County's failure to obtain a prompt probable cause for arrest determination. The Riverside County policy which the named plaintiffs challenge is admitted and defended throughout this record. (1 J.A. 91; 105-106; Petitioner's Opening Brief (hereinafter "Pet. Opening Brief", Heading II).) See also Amicus Curiae Brief of Grover Trask, District Attorney, Riverside County.

Where, as here, sufficient facts have been pleaded to show standing, the party asserting lack of standing may not do so by means of a motion to dismiss for lack of standing. Instead, a motion for summary judgment should be brought, supported by evidence so that the district court can evaluate the standing claim based on evidentiary findings, not on pleading allegations. *Haase v. Sessions*, 835 F.2d 902, 904 (D.C. Cir. 1987) No such submission was made by the County. As they state in their Statement of the Case (Pet. Opening Brief, pp. 3-5), the County filed a motion to dismiss the First Amended Complaint; thereafter a Second Amended Complaint was filed, the County's motion to dismiss was taken off calendar and defendants answered. The County did not file a motion to dismiss either the complaint or the motion for summary judgment presenting any evidence that might defeat standing.

The County contends (Pet. Opening Brief, p. 10, 16) that the "constitutional violation asserted as the basis for the plaintiffs' equitable complaint was, as to the named plaintiffs, concluded at the time the complaint was filed" and therefore there was no continuing or future injury to be redressed by injunction.

Looking back from the vantage point of the injunction issued by the trial court on April 19, 1989 (2 J.A. 332-334), nine months after the Second Amended Complaint was filed, the County now contend that the 36-hour period constitutes the maximum time during which plaintiffs retained a constitutional right to a prompt determination of probable cause for their arrest.

The County argues that the constitutional violation alleged occurred and was finally concluded at the date and hour when the 36-hour time limit for a determination of probable cause for arrest later specified in the preliminary injunction expired. After that precise moment, it is asserted that there was no longer a constitutional violation to be redressed. (Pet. Opening Brief, p. 10.)

The Second Amended Complaint prayed only for a prompt probable cause determination (1 J.A. 7). At the time that Complaint was filed, there had been no determination of the maximum period within which the probable cause determination must occur. Before there could be any basis for asserting that the determination was required within 36 hours, the issue of the proper maximum period of time for such a determination had to be adjudicated.

The first time plaintiffs asked for a hearing within 36 hours after arrest was in their Motion for Preliminary Injunction, filed March 3, 1989. (1 J.A. 16.) The County cannot properly apply hindsight to assert that, after 36 hours in custody, plaintiffs had lost their constitutional

right to a probable cause determination within 36 hours after a warrantless arrest — a period which had not been adjudicated at the time the complaint was filed. The fact that more than 36 hours may have elapsed at the time the Second Amended Complaint was filed did not deprive plaintiffs of the right to a determination of a specific time limit for a hearing. The County, at a minimum, was required to effectuate that determination immediately in order to remedy to the maximum extent possible the wrong that had been committed. If plaintiffs, as they allege, have been unconstitutionally denied a prompt probable cause determination in connection with their warrantless arrests, each day, each hour in which they were detained without a determination of probable cause for their arrests, constitutes a violation of the fundamental constitutional right to a determination of such probable cause, and a hearing, however belated, would remedy that. Even if the 36-hour period has expired, the court can specify that a probable cause determination should be made within 36 hours after arrest without a warrant (which potentially will benefit both the individuals and the class). After the 36-hour period has lapsed, the court can still redress the subsequent continuing daily and hourly violations of plaintiffs' right to such determination.

The principle which the County would have this Court adopt would instruct that if there was a finding that a person in custody had been illegally arrested, he would be entitled to no relief because the alleged arrest had already been consummated. The County's own Brief negates that absurd position. Citing and quoting from *Warth v. Seldin*, 422 U.S. 490, 498-499, 95 S.Ct. 2197, 2205 (1975), it states:

> To determine whether a plaintiff has a "personal stake" in the lawsuit so as to confer standing under Article III, the "relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision." (Pet. Opening Brief, pp. 14-15.) [The same language is quoted from the case of *Lewis v. Continental Bank Corp.*, ____ U.S. ____, 110 S.Ct. 1249, 1253 (1990). (Pet. Opening Brief, p. 21.) The County poses the issue as whether the "injunctive relief would remedy the injury which spawned the lawsuit." (Pet. Opening Brief, p. 17) It is self-evident that even a belated determination of plaintiffs' right to a probable cause determination would remedy, in part at least, the injury suffered by plaintiffs and certainly it would provide relief for the class members.

On the one hand the County argues that 36 hours having elapsed without the required determination, the individual plaintiffs lack the required motivation to rigorously prosecute the case because they can no longer get any benefit from the injunction. On the other hand, it argues that *res judicata* in a damage action by plaintiffs is a benefit that would give the plaintiffs the remedy that they are seeking. (Pet. Opening Brief, p. 28, n.9.) Since the County maintains that prisoners cannot enforce their right to a hearing through an injunctive action, it is hard to fathom what benefit attaches under their proffered analysis. Here, at the very least, the injunction would afford plaintiffs a *res judicata* holding that 36 hours is the time limit for a determination of probable cause for arrest. Thus, the County's position negates its argument regarding the alleged lack of motivation.

B. Plaintiffs' Action Was Certified As A Class Action; The Focus Of Inquiry Re Standing Shifts To The Standing Of The Class, Which Standing Is Clearly Established.

The class requested by plaintiffs is described in the Second Amended Complaint (1 J.A. 7) as "all present *and future* prisoners in the Riverside County Jail including those pre-trial detainees arrested without warrants held in the Riverside County Jail from August 1, 1987 to the present, and all such future detainees who *have been* or may be denied prompt probable cause, bail or arraignment hearings." (Emphasis added.)

Plaintiffs moved promptly, less than two months after the original complaint was filed, to obtain class certification. Hearings on this motion were repeatedly continued by the court. When the Second Amended Complaint was filed, the Motion was still pending and the only opposition to certification made by the County was an objection to the proposed subclass of pregnant women. (2 J.A. 338.) At no time after the Second Amended Complaint was filed did defendants otherwise object to the certification or to the standing of the named plaintiffs to represent the class. (2 J.A. 335-339.)

The class was certified on November 15, 1988. (2 J.A. 338.) At this point, five months before the injunction was granted on April 19, 1989 (2 J.A. 332-334), there had been no judicial determination of the period during which a probable cause determination must be made. The class comprises future warrantless arrestees, and it is accordingly a continuing class, suffering from a continuing policy that detains class members for more than 36 hours without the required probable cause determination. It is an inherently transitory class, but the constant existence of a class of persons suffering the deprivation of constitu-

tional rights is certain. *Gerstein v. Pugh,* 420 U.S. 103, 110, n.11, 95 S.Ct. 854, 861, n.11 (1975).

As in *Gerstein,* the record here does not show whether any of the named plaintiffs were still in custody when the district court certified the class. This Court discussed this problem in *Gerstein,* ibid:

> Such a showing ordinarily would be required to avoid mootness under *Sosna.* But this case is a suitable exception to that requirement. See *Sosna,* supra, 419 U.S. at 401, n.11, 95 S.Ct. at 559 n.11; cf. *Rivera v. Freeman,* 469 F.2d 1159, 1162-1163 (CA9 1972). The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time . . . *It is by no means certain* that any given individual, named as plaintiff, would be in pretrial custody *long enough for a district judge to certify the class.* Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. (Emphasis added.)

Upon class certification, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by the named plaintiffs. *Sosna v. Iowa,* 419 U.S. 393, 95 S.Ct. 553 (1975). As in *Sosna,* even though the County here might not again deny the named plaintiffs a constitutionally prompt probable cause hearing, it is clear that it will enforce the present policy against those persons in the class that the named plaintiffs sought to represent and that the district court certified.

> In this sense the case before us is one in which [county] officials will undoubtedly continue to enforce the challenged [policy] and yet, because of the passage of time, no single challenger will remain subject to its restriction for the period necessary to

see such a lawsuit to its conclusion. *Sosna,* 419 U.S. at 400, 95 S.Ct. at 558.[10]

The issue here is standing of the named plaintiffs at the time the Second Amended Complaint was filed. It is clear that they did have standing at that time. The certified class which the named plaintiffs represent is an inherently transitory, continuing class; it has standing to bring this action.[11]

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[10]See also *Foster v. Center Township of LaPorte County,* 798 F.2d 237, 245 (7th Cir. 1986):

> . . . [I]f the claim is of such a transitory nature that the district court cannot reasonably be expected to rule on the motion for certification before the expiration of the named plaintiff's claim, the certification may be deemed to relate back to the filing of the original complaint." [Citing *Gerstein,* supra, n. 11] This position is fully supported by the 23 states which filed a joint Brief Amici Curiae in support of the Petition for Certiorari. At page 28 thereof they state that ". . . in this case, a class is named and certified, for the requirements of Article III standing, like statutory jurisdictional requirements, apply to each member of the class, just as if they were named members of the class.

See *Zahn v. International Paper Co.,* 414 U.S. 291, 94 S.Ct. 505 (1973); *Sosna v. Iowa,* 419 U.S. 393, 402 (1975).

[11]The County does not contend that the named plaintiffs' individual claims have become moot in the two years which have elapsed since class certification; it apparently concedes that the standing of the class is not forfeited because the named plaintiffs' claims may be moot. *Sosna,* supra. See also, *United States Parole Comm'n v. Geraghty,* 445 U.S. 388, 397-398, 100 S.Ct. 1202, 1209 (1980):

> Mootness of the named plaintiff's individual claim after a class has been duly certified does not render the action moot . . . . The Court [in *Sosna*] stated specifically that an Article III case or controversy "may exist between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot.

It is of course correct, as the County contends (Pet. Opening Brief, pp. 15-16), that class certification standing alone "adds nothing to the question of standing . . . ." However, the case at bar differs significantly from the principal case on which the County relies, *Simon v. Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 40 n.20, 96 S.Ct. 1917, 1925 n.20, (1976). In *Simon,* the Court found that the injury the named plaintiff complained of could not be "fairly . . . traced to the challenged action of the defendant." 48 L.Ed.2d at 462. Here, the named plaintiffs suffered injury directly as the result of an official policy of the County.

In *Foster v. Center Tp. of LaPorte County,* 798 F.2d at p. 242, the purported class action was dismissed because Foster, the named plaintiff, was not a member of the class described. Her eligibility for relief was not threatened by the challenged eligibility guidelines. The named plaintiffs herein, however, were directly injured by the challenged County policy. In *Holmes v. Fisher,* 854 F.2d 229 (7th Cir 1988), Holmes was denied the right to represent a class in his challenge to unconstitutional detention without a probable cause determination on the ground that he had been arraigned before he filed the action and that accordingly the issue as to the validity of the arrest no longer existed when he filed his complaint. As the 7th Circuit commented,

> This case was dead on arrival, moot the day the complaint was filed. So far as equitable relief was concerned, there was never a case or controversy within the meaning of Article III of the constitution. *Geraghty* does not breathe life into a stillborn case. *Holmes,* 854 F.2d at 232.

In contrast, here the named plaintiffs were in custody and had not received a probable cause determination, nor had

they been arraigned; the issue of probable cause for the arrest was very much alive at the time the complaint was failed. The named plaintiffs were still suffering the wrong complained of — the same wrong suffered by the class they sought to represent.

C. The Duly Certified Class Meets All Prerequisites For Injunctive Relief.

In addition to Article III "case or controversy" standing, when plaintiffs seek *injunctive* relief, they must also meet the equitable prerequisites for such relief. The plaintiff class is suffering, and will suffer in the future, irreparable harm because of the loss of a fundamental constitutional right.[12] Continued detention in the absence of a prompt judicial determination of probable cause for the arrest, is a constitutional right on the same level as freedom of speech, freedom of association for purposes of union organizing, and due process. But there is more.

Plaintiffs have alleged that this unlawful detention takes place under conditions which are violative of other rights — prisoners are forced to sleep on the floor of "triple bunked" cells; denied adequate access to counsel and adequate visitation rights; and subject to excessive force by guards. (1 J.A. 5.) In addition, as this Court pointed out in *Gerstein v. Pugh,* 420 U.S. at 114, 95 S.Ct. at 863, "Pretrial confinement may imperil the suspect's job, interrupt his sources of income, and impair his family relationships."

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[12]*Cf. Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 2690(1976) ["The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."]; *Allee v. Medrano,* 416 U.S. 802, 94 S.Ct. 2191 (1974) [Lawful effort to organize a lawful union crushed because of intimidation by police].

In their contention that plaintiffs lack standing to seek injunctive relief, the County relies principally on *City of Los Angeles v. Lyons,* 461 U.S. 95, 103 S.Ct. 1660 (1983) for the proposition that a plaintiff "could not seek injunctive relief absent the allegation that he would again be detained by police officers and be subjected to the alleged improper use of force." (Pet. Opening Brief, p. 18.) The County quotes from *Lyons:*

> Lyons' standing to seek the injunction requested-depended on whether he was likely to suffer future injury from the use of the chokeholds by police officers. Count V of the complaint alleged the traffic stop and choking incident five months before. That Lyons may have been illegally choked by the policeon October 6, 1976, while presumably affording Lyons standing to claim damages against the individual offieers and perhaps against the city, does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part.

461 U.S. at 105, 103 S.Ct. at 1667.

The County's eliance on *Lyons* is misplaced; there are highly significant factual differences between *Lyons* and the case at bar which make the *Lyons* rule inapposite:

(a) In *Lyons,* the wrong alleged by the plaintiff had indeed been "concluded" before the complaint was filed; Lyons suffered the alleged illegal chokehold five months before filing his complaint. At that time there was no proof of a continuing illegal policy or practice in effect at that time. He may have had Article III standing for his "case or controversy" over damages, with respect to injunctive relief, as the court said in *Holmes v. Fisher,* 854

F.2d at 232, "the case was dead on arrival . . . a stillborn case."

In the case at bar, the plaintiffs were in custody, deprived of their constitutional right to a prompt determination of the legality of their arrest at the time the complaint was filed.

(b) Here, as distinguished from *Lyons,* there is no *bona fide* issue of mootness, once the class was certified. Although the plaintiff in *Lyons* sought to represent a class, the class had not been certified; Lyons's claim was handled as the claim of an individual. In this action the plaintiffs obtained certification of a class comprising all present and future warrantless arrestees. Any intervening mootness of the named plaintiffs' claims did not render the claims of the class moot. *United States Parole Comm'n v. Geraghty,* 445 U.S. 388, 404, 100 S.Ct. 1202, 1212 (1980).

(c) Plaintiff Lyons was unable credibly to allege the existence at any time of an official policy of the City authorizing the police conduct of which he complained:

> . . . [F]or Lyons to succeed in his damages action, it would be necessary to prove that what happened to him — that is, as alleged, he was choked without any provocation or legal excuse whatsoever — was pursuant to a city policy. [The City's] policy is described . . . as authorizing the use of chokeholds 'in situations where the officers are threatened by far less than deadly force.' This is not equivalent to the unbelievable assertion that the City either orders or authorizes application of the chokeholds where there is no resistance or other provocation. *Lyons,* 461 U.S. at 106, n.7, 103 S.Ct. at 1667, n.7.

On the other hand, not only do plaintiffs herein allege that they are unconstitutionally detained under an official

policy of the County of Riverside (1 J.A. 4-5), but the County in its Opening Brief continues to concede and defend the very policy involved in this case. (1 J.A. 24-29, 31, 33-36, 40-41, 42, 44-45, 47-53, 55, 57, 61-62, Pet. Opening Brief, Heading II.)

The existence of an official policy of the governmental unit involved is critical to the determination of whether or not there is a "reasonable likelihood" that the class will suffer future harm; *Lyons* is distinguished by its failure to "plausibly allege" that the City "authorized police officers to act in . . . [the] manner [complained of]." *Honig v. Doe,* 484 U.S. 305, 322, 108 S.Ct. 592, 603 (1988.) In *Weinstein v. Bradford,* 423 U.S. 147, 148, 96 S.Ct. 347, 348 (1975), the Court cited *Super Tire Engineering Co. v. McCorkle,* 416 U.S. 115, 94 S.Ct. 1694 (1974) for the proposition that "it was enough that the petitioner employer showed 'the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect the present interest' . . ."[13]

In the instant case, the "present interest" is the interest of the class of present and *future* warrantless arrestees, which is adversely affected by the "immediate and definite" policy of the County of Riverside. The circumstances of the plaintiff class establish that the threat of future harm is certain; the class has met this prerequisite for injunctive relief.

Further, there is no complete or adequate legal relief other than injunction. Here the loss relates to the constitutionality and legality of the failure to have a prompt

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[13] Similarly, in *O'Shea v. Littleton,* 414 U.S. 488, 94 S.Ct. 669 (1974), an injunctive relief action was not allowed because the Court assumed plaintiffs would not violate the law in the future. Here, plaintiffs have merely been arrested without a warrant. Their innocence of any violation of the law is presumed.

determination of probable cause for a warrantless arrest and the resulting deprivation of freedom. It belies the very substance of our system of government to assert that an action for damages is an adequate substitute for an injunction requiring such a prompt determination. This would be true even if the conditions of imprisonment were more like hotel living than the conditions described in the complaint.

To say that the individuals have a civil action for damages is to surrender to an illusion. The County's proposed remedy does not get them the hearing which will immediately alleviate the constitutional deprivation. Rather, it proposes that, based on the Orange County statistics, 9.1% of all the prisoners in the Riverside County jail should file civil rights actions in the federal district court to get damages. Setting aside the issue of whether most of these would be *in pro per* because of the lack of attorneys to file such cases, it is an absurd suggestion.

Even if the civil remedy of damages were realistic, it would be a remedy for the plaintiff *individually,* not for the plaintiff as a representative of the class or for the class as a whole. Plaintiffs have a right to protect the interests of a class. The unnamed members of the class, who are perhaps for one reason or another helpless to act on their own individually, have a right to be protected by the vigorous advocacy of their class representatives.

Injunctive relief is the *only* remedy which can assure the elimination of the unconstitutional policy. Without injunctive relief, while an action for damages was making its tortuous way through the clogged state or federal courts, the governmental agency would be able to continue its challenged policy. Even if damages were awarded to an individual, the governmental agency might

still not change its policy, deeming it better to pay the damages and keep a policy which it considers of benefit to the County. Without injunction, the County "would be free to return to [its] old ways." *Allee v. Medrano,* 416 U.S. 802, 811, 94 S.Ct. 2191, 2198 (1974)[14]

II. TO DENY STANDING TO SEEK INJUNCTIVE RELIEF HERE IS TO CREATE A WRONG FOR WHICH THERE IS NO ADEQUATE OR COMPLETE REMEDY AND TO PERMIT A GOVERNMENTAL WRONG TO GO UNREDRESSED; THIS VIOLATES THE BASIC PRINCIPLES OF OUR CONSTITUTION.

The basic principle of our democracy, as stated in the Declaration of Independence, is that government derives its just powers from the consent of the governed. Our written Constitution, and in particular its Bill of Rights, was adopted to provide a bulwark for the people against arbitrary and tyrannical acts of government. The court system was established to provide a means for the people to vindicate their rights against government encroachment; access to the courts is a *sine qua non* of freedom.

This Court has recognized this principle in *Sosna,* supra, 419 U.S. at 401, n.9, 95 S.Ct. at 558, n.9:

> A blanket rule under which a class action challenge to a short durational residency requirement would be

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[14] It has been suggested by the County (Pet. Opening Brief, p.25) that the named plaintiffs could have sought habeas corpus relief. This remedy also is incomplete and illusory. When a writ is issued, it usually affects only the individual plaintiff. It applies only to those persons "in custody." 28 U.S.C. §2254. By its very nature class habeas corpus may be granted for *present* detainees; it cannot be granted for unnamed, unknown, future warrantless arrestees not yet in custody. It does not eliminate the challenged policy, and therefore provides no relief for the *class* of future warrantless arrestees.

dismissed upon the intervening mootness of the named representative's dispute would permit a significant class of federal claims to remain unredressed for want of a spokesman who could retain a personal adversary position throughout the course of the litigation.

Here, without injunctive relief, the claims of the plaintiff class will remain unredressed. To deny standing to the class would mean that there was no remedy for the most "significant class of federal claims" — those involving a challenge to oppressive government policy and action. "Our law should not be that rigid." *Roe v. Wade,* 410 U.S. 113, 125, 93 S.Ct. 705, 713 (1973).

III. THE ISSUES IN THIS CASE DEAL WITH PROBABLE CAUSE FOR ARREST; THE COUNTY CONFUSES PROBABLE CAUSE FOR ARREST WITH PROBABLE CAUSE FOR DETENTION FOR TRIAL. THE LAW CONCERNING ARRAIGNMENTS RELIED UPON BY THE COUNTY IS IRRELEVANT TO THE TRUE ISSUES OF THIS CASE

The argument presented by the County that certain arraignment and preliminary hearing procedures are available under state law is simply irrelevant. In their opening brief (Pet. Opening Brief, Heading II, pp. 30, 39-44), the County relies on *In re Walters,* 15 Cal. 3d 738, 126 Cal. Rptr. 239, (1975) as settling the law in California with respect to the interpretation of *Gerstein v. Pugh,* 420 U.S. 103, 95 S.Ct. 854 (1975). This is a misstatement of *In re Walters. Walters* sought habeas corpus on the basis of the *Gerstein* decision. On appeal, the California Supreme Court applied *Gerstein* principles to an arraignment situation, and, unfortunately, failed to specify that it was not dealing with the issue of probable cause for arrest.

It is clear from even a cursory perusal of *Walters* that it does not deal with the issue of probable cause for arrest, the heart of *Gerstein* and of the case at bar. Rather, *Walters* deals with probable cause for detention for trial. The court held, "unless waived, a judicial determination of probable cause is required in every case where a defendant charged with a misdemeanor is detained awaiting trial." *In Re Walters,* 15 Cal. 3d at 747.[15]

When a defendant is arrested without a warrant, "the judge may make his determination [of probable cause] upon a sworn complaint which incorporates by reference other factual materials which, together with the complaint . . . may include a copy of a police or other report which forms the basis for the complaint and arrest." *Id.*, 15 Cal. 3d at 751, n.6. "If the relevant documentation does not support probable cause for continued detention, the court may receive testimonial evidence on the issue in the presence of e defendant and his attorney . . . [D]efendant . . . has no right to confront and cross-examine the witnesses who testify on the issue of probable cause to detain." *Id.*, 15 Cal. 3d at 752-753.

The inclusion in the probable cause hearing of post-arrest investigation materials, the post-arrest complaint, and "other reports" or "testimonial evidence" clearly does not relate to probable cause for arrest. None of these materials was available to the arresting officer at the time of arrest on which could be based the probable cause for arrest.

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[15] By this statement, the court made it quite clear it was addressing probable cause for detention. Since Penal Code Section 859b requires a preliminary hearing within ten days after the arraignment, the court found no need to approve a pretrial procedure allowing for a probable cause for continuing detention hearing for persons charged with felonies. *In re Walters,* 15 Cal. 3d at 752, n.8.

California Penal Code Section 991 enacted "in light of the California Supreme Court's decision in *In re Walters,*" (Pet. Opening Brief, p. 40), mirrors *Walters* in that it too deals with probable cause for detention for trial, *not* probable cause for arrest.

Section 991(a) applies to a person arrested without a warrant and "charged with a misdemeanor to which he has pleaded not guilty." This occurs at a subsequent stage of the proceedings, after a complaint has been issued and entails the inclusion of materials gathered *after* arrest, materials which were not available to the arresting officer at the time he formed his "reasonable suspicion" that there was cause for arrest. Further, Section 991(a) provides that the magistrate, on motion of counsel for the defendant or the defendant, "shall determine whether there is probable cause to believe that a public offense has been committed and that the defendant is guilty thereof." This is clearly the standard for determining probable cause to hold for trial.

Subparagraph (c) of Section 991 makes this point even more specific. It lists the materials which the magistrate shall consider in determining the existence of probable cause: "any warrant of arrest with supporting affidavits, and the sworn complaint together with any documents or reports incorporated by reference thereto . . . or any other [reliable] documents . . . ."

Penal Code Section 991 does not prescribe a pretrial procedure to comply with *Gerstein.* Its provisions for probable cause for detention determinations are designed to cure the lack of such requirement in earlier statutes; compliance with Section 991 cannot be equated with compliance with the *Gerstein* mandate.

IV. THE PROCEDURES FOLLOWED BY RIVERSIDE COUNTY DO NOT PROVIDE FOR A PROBABLE CAUSE FOR ARREST HEARING AS REQUIRED BY THE FOURTH AMENDMENT

A. A Finding of Probable Cause for Arrest is Required by the Fourth Amendment, and is, in Effect, a Post-Arrest Determination that the Facts Known at the time of Arrest Were Sufficient to Support the Issuance of a Warrant.

In *Gerstein v. Pugh,* this Court held that an adult arrested without a warrant must be provided with a prompt post-arrest hearing to determine probable cause for arrest. The hearing is necessary in order to examine "the legal justification for arresting a person suspected of [a] crime," when there is no warrant. 420 U.S. at 113-114, 95 S.Ct. at 863. The hearing serves the purpose of a post-arrest warrant where the warrantless arrest is allegedly justified by the exigencies of the situation. Pursuant to such an arrest, the person may be held "for a brief period of detention to take the administrative steps incident to arrest" prior to receiving a probable cause hearing to determine whether, at the time of arrest, the officer had sufficient articulable information which would allow the warrantless arrest. *Id.* At the hearing the magistrate applies the same standard "as that for arrest." 420 U.S. at 113-114, 95 S.Ct. at 863. The standard is "probable cause to believe the suspect has committed a crime." *Id.* Such a hearing is necessary not only because of strict Fourth Amendment probable cause standards but also because "[p]retrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships." [citations omitted] 420 U.S. at 114, 95 S.Ct. at 863. Without mandating a specific procedure the court ruled that the probable cause for arrest determi-

nation must "be made by a judicial officer either before or *promptly* after the arrest." (Emphasis added.) 420 U.S. at 125, 95 S.Ct. at 869.

The key to understanding and resolving the controversy between County and plaintiffs lies in recognizing the difference between a post-arrest hearing to determine whether or not there was probable cause for arrest, and an arraignment hearing at which it is determined whether or not the person arrested shall be held for trial on specified charges. An arraignment is not, no matter how long or how soon after arrest it is held, the same as the prompt, post-arrest determination of probable cause for arrest which this Court ordered in *Gerstein v. Pugh*. An arraignment is simply the procedure whereby an arrested person is presented with written charges and called upon to plead to them. California has statutes governing the maximum amount of time during which an arrested person may be kept in confinement without being arraigned. These statutes serve an essential and admirable purpose. Prompt arraignment assures that persons arrested will not be held for prolonged periods of time without written charges being brought against them. This is a separate and distinct right from that which forbids arrest, except upon probable cause. As Judge Gadbois aptly remarked at the district court hearing, "there's a clear difference between the concept of arraignment, as expressed in the Penal Code, and the *Gerstein* process." (1 J.A. 11.)

In *Gerstein v. Pugh,* this Court set forth the basic principle that: "The Fourth Amendment *requires* a judicial determination of probable cause as a pre-requisite to extended restraint of liberty following arrest." (Emphasis added.) 420 U.S. at 114, 95 S.Ct. at 863.

The potential for harm to innocent parties is perhaps best exemplified by two facts. The first is contained within

the County's survey. Of the 46 felony arrestees released, 16 (34.8%) were released pursuant to Penal Code § 825, which means they were held for 48 hours or longer, without a probable cause for arrest hearing, without being charged and without being arraigned. (2 J.A. 266-267.) The second is the County's admitted policy of holding people without charging them and then releasing them "at about 5:00 p.m. on the last day for arraignment." (1 J.A. 82.) Thus, innocent people are held for up to seven days without ever having a probable cause for arrest hearing, without being charged and without being arraigned. This Court, in *Gerstein,* found a prosecutor's analysis of probable cause to be insufficient. 420 U.S. 119, 120, 95 S.Ct. at 865. The County proposes to replace the standard already rejected by this Court with an even less neutral process, i.e., the arresting officer makes the determination. This Court, to accept the County's analysis on the facts of this case would have to overturn *Gerstein v. Pugh.*

B. The County of Riverside Seeks to Eviscerate Fourth Amendment Protections by Allowing the Determination of Probable Cause at the Time of Arrest to Be Made Based Upon Documents and Information Obtained After the Arrest was Made As Well As By Using the Detention Period to Collect Evidence.

In *Gerstein v. Pugh,* this Court, citing to *Mallory v. United States,* 354 U.S. 449, 456, 77 S.Ct. 1356, 1360 (1957) stated:

> Presumably, whomever the police arrest they must arrest on "probable cause." It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a

committing magistrate on "probable cause." 420 U.S. at 120 n.21, 95 S.Ct. at 866, n.21.

The County admits that, after arrest and prior to arraignment, the investigating agencies collect significant investigative material, maintaining that:

> In approximately ten percent of the cases, complications may be added which will act to slow the procedures described in the factual background portion of this brief. (Footnote omitted.) For example, at a crime scene, where there has been a homicide for instance, a number of agencies in addition to the police or sheriff may respond and be required to gather evidence and file reports. The coroner will respond to examine the body before it is moved; the Criminalistics Branch of the California Department of Justice may respond to gather evidence and take samples; the F.B.I. may appear if the crime is somehow believed to have an interstate character. (Amicus Curiae Brief of Grover Trask, District Attorney, County of Riverside, pp. 16-17.)

The County of Riverside specifically notes that "all of these agencies must file reports, and when they respond to a scene after a crime has been committed, *their reports may be important in deciding if a person was properly arrested at the scene upon probable cause.*" (Emphasis added.) *Id.* at 17.[16] This position stands on its head the concept of determining probable cause "at the time of arrest." It seeks to delay the probable cause hearings in order to collect evidence subsequent to the arrest so as to

[16]Riverside County's approach has been determined to be as unlawful under state law as it is in the federal context. In *People v. Powell*, 67 Cal. 2d 32, 60, 59 Cal. Rptr. 817 (1967), the Court stated that one of: "the principal purposes of the requirement(s) of prompt arraignment [is] to prevent secret police interrogation . . . ".

justify the original arrest for which the arresting officer may not have had probable cause. This is exactly the situation which *Gerstein* intended to prevent. The Constitution does not allow a person to be detained in order for evidence to be collected to justify a prior arrest.

The *Gerstein* Court explained that "a policeman's on-the scene assessment of probable cause provides legal justification for arresting a person suspected of crime and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate." 420 U.S. at 113-114, 95 S.Ct. at 863.

In *Llaguno v. Mingey,* 763 F.2d 1560, 1568 (7th Cir. 1984) Judge Posner analyzed the *Gerstein* requirements which allow some interval for booking the arrested person and completing other paperwork prior to presentation to a neutral magistrate. In ruling that this interval could not be used as mechanism for collecting evidence to justify an otherwise unlawful arrest, he stated:

> The only reason for delay in bringing [the defendant] before a magistrate was that the police hoped to build a case against David while he was in jail, and this is not a permissible reason for jailing someone indefinitely. It would inject an element alien to our system — imprisonment on suspicion, while the police look for evidence to confirm their suspicion. Of course the delay here was not indefinite, but it was almost two days; and with no better reason offered than the police were still investigating David's possi-

ble involvement in the crimes of his brother, it was too long.[17]

The County's policy is specifically intended to delay any hearings in order to collect evidence because, as noted above, "their reports may be important in deciding if a person was properly arrested at the scene upon probable cause." This is as unlawful under state law as it is under federal law. To accept the County's position would result in overturning bed rock constitutional principles. This Court should find the County's practice to be unconstitutional.

V. THE FAILURE TO ACTUALLY PROVIDE A PROMPT PROBABLE CAUSE FOR ARREST HEARING VIOLATES BOTH FOURTH AND FOURTEENTH AMENDMENT PRINCIPLES.

The procedure followed by the County is unconstitutional because no probable cause for arrest hearing is ever actually provided; none is even considered until after arraignment and then only if requested. Such a procedure offends basic due process concepts. "Whether any procedural protections are due depends on the extent to which

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[17]The need for a prompt probable cause for arrest hearing is also illustrated by the ruling in *McNabb v. United States*, 318 U.S. 332, 343-344, 63 S.Ct. 608, 614 (1943) where the court found that,

> Legislation, [5 U.S.C.A. § 300a; 18 U.S.C.A. §§ 593, 595], requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard — not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this procedural requirement checks resort to those reprehensible practices known as the "third degree" which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime.

an individual will be 'condemned to suffer grievous loss.' " *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 2600 (1972). "The question is not merely the 'weight' of the individual's interest but whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." *Morrissey,* 408 U.S. at 481, 92 S.Ct. at 2600, citing *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983 (1972).

As noted by Circuit Judge Goldberg in his concurrence in *United States v. Garza,* 754 F.2d 1202, 1211 (5th Cir. 1985), "[a]lthough . . . [n]either a warrantless arrest, by itself, nor failure to bring a detainee before a magistrate, by itself, deprives a detainee of his constitutional rights, the commission of both offenses implicates the fourth and fourteenth amendments."

The nature of the right involved in this case is the liberty interest safeguarded by the Fourth Amendment. Depriving someone of liberty inflicts a "grievous loss" on that person and "its termination calls for some orderly process, however informal." *Morrissey,* 408 U.S. at 482, 92 S.Ct. at 2601. The Court in *Morrissey* held that in revoking parole, due process would require that some minimal inquiry be conducted and that this inquiry should be seen as in the nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions. 408 U.S. at 485, 92 S.Ct. at 2602. Due process requirements must be determined by considering "the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Morrissey,* 408 U.S. at 494, 92 S.Ct. at 2607.

In the *Morrissey* context, this Court held that "the parolee should be given notice that the hearing will take

place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation." 408 U.S. at 487, 92 S.Ct. at 2603. The analysis applies directly to the instant action. Upon arrest, a hearing should be promptly held to determine whether there was probable cause for arrest.

The procedure followed by Riverside County cannot pass constitutional muster. The burden cannot be placed upon the prisoner to request a hearing at a time when he or she is incarcerated, potentially without counsel, by responding to a video tape which takes less than three minutes to read and which has *one sentence* (which is vague as to what will be done if the request is made and even when it will be done) and does not even have a live person of whom to make a request. Further, at best, the present system's provision of a probable cause hearing is illusory. It is not surprising, therefore, that the County admits that "[v]irtually every prisoner . . ." fails to demand a hearing. (Amicus Curiae Brief of Grover Trask, District Attorney, Riverside County, p. 8.) The County maintains that the arraignment and preliminary hearing process somehow merge with the prompt probable cause for arrest hearing mandated by *Gerstein v. Pugh*. The effect of this merger is to eliminate completely the probable cause for arrest hearing and replace it with nothing. The Riverside County procedure offends Due Process and the Fourth Amendment.

VI. CALIFORNIA'S ARRAIGNMENT PROCESS DOES NOT ADDRESS THE PROMPTNESS COMPONENT OF PROBABLE CAUSE HEARING FOR A WARRANTLESS ARRESTEE CONSISTENT WITH THE REQUIREMENTS OF *GERSTEIN V. PUGH*

A. The State Arraignment Procedures Only Define the Outer Limits of Time for Arraignment. They Do Not Address the Time Period for the Probable Cause for Arrest Hearing.

The facts of this case are undisputed. An arraignment under Riverside County's procedures will take place from 2-7 days after arrest. No evidence was presented that showed any necessity for such a lengthy period of detention. In fact, the County admits that in "nearly 90 percent of all cases in Riverside the procedures needed to complete arrest reports can be completed in 24 hours." The only reason for extending the time period is to collect more evidence on the remaining 10 percent. (Amicus Curiae Brief of Grover Trask, District Attorney, County of Riverside, pp. 16-17). Riverside County argues that its policy complies with *Gerstein v. Pugh* because the *Gerstein* hearing merges with the California arraignment process for misdemeanors and felonies, and a separate, prompt proximate cause for arrest hearing can therefore be eliminated. Such argument is almost a *non sequitur* to the Fourth Amendment attack on these policies. The California Constitution and Penal Code do allow for some form of probable cause hearing which occurs subsequent to the arraignment process. However, there is no requirement, as the County implies, that under California law the probable cause *for arrest* hearing *must* await the arraign-

ment. In fact, the opposite is true. In *Dragña v. White*, 45 Cal. 2d 469, 473 (1955) the court stated:

> The statute [P.C. 825] . . . does not authorize a two-day detention in all cases but, instead, places a limit upon what may be considered a necessary delay, and a detention of less than two days, if unreasonable under the circumstances, is in violation of the statute . . . . The duty to bring the prisoner before a magistrate without delay is even more imperative where, as here, the arrest is made without a warrant. (Citations omitted.)

For *Gerstein's* requirement of "promptness" to be met the probable cause for arrest hearing must occur prior to arraignment particularly if Riverside County's arraignment procedure is followed. This can easily be done within the context of the present California statutory scheme.[18]

Even a quick analysis of the applicable California law highlights the errors in the County's argument. Article I of the California Constitution delineates, *inter alia*, certain right of persons arrested for crimes. Section 15 requires that a person in police custody be promptly brought before a magistrate and formally charged. Section 14 requires that "[a] person charged with a felony by complaint . . . be taken without unnecessary delay before a magistrate." These rights are implemented in Penal Code Sections 825, 849, 859b, and 991. Section 849 reiterates Article 1, Section 14, in that all arrestees are to be brought before a magistrate without unnecessary delay. Section 825 establishes that an *arraignment* must occur within 2 days of the arrest, excluding Sundays and holidays. Section 991 applies only to misdemeanors and requires that a probable cause for arrest hearing occur at the arraignment "if the defendant is in custody"; however, it does not require that the probable cause hearing occur only at the first arraignment. Section 859b requires that a felony arrestee be brought before a magistrate at the arraignment; however, it does not address whether probable cause for the arrest is to be determined at the arraignment. In fact, the county admits that, for felonies, no probable cause hearing of any kind will be held until up to ten (10) days after the arraignment at the preliminary hearing. (2 J.A. 299.) Obviously, a preliminary hearing at which evidence as to much more than the arrest is presented does not contemplate the *Gerstein* probable cause for arrest hearing.

Even if Riverside's policy does comply with the California arraignment procedure for both felonies and misdemeanors, neither the promptness nor the probable cause for arrest requirements of *Gerstein v. Pugh* are met. Whether Riverside County complies with state law concerning arraignments is irrelevant to a determination of promptness under *Gerstein*.

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[18]Judge Gadbois in conjunction with ruling that the California arraignment process is different from the *Gerstein* process (1 J.A. 11), was quite specific that he was not going to make any rulings on the California Constitution. He stated at the preliminary injunction hearing: "My only problem with your papers is that if you think I'm going to go roaming through the Penal Code of the State of California declaring everything in there unconstitutional, you're sorely mistaken." (1 J.A. 10.) He immediately reiterated that position: "The arraignment process does not. It clearly does not comport with *Gerstein*. I'll be happy to say that, if you give me some language to that effect. But don't tell me to declare the Penal Code of California unconstitutional. That's just a little much." (1 J.A. 11.)

B. Even if the Type of Hearing Provided for Related to Probable Cause for Arrest, the Detention Time Established by Riverside County's Procedure Would Be Violative of the Fourth Amendment Promptness Standard.

Assuming, *arguendo,* that Riverside County's policy and procedure culminate in a probable cause for arrest hearing, the delay for the hearing that is ultimately held violates the principle of promptness that is constitutionally required. The California cases that deal with "unnecessary delay" construe Penal Code § 825 as it is applied to arraignments. *Youngblood v. Gates* 200 Cal. App. 3d 1302, 246 Cal. Rptr. 775 (1988); *People v. Chambers* 276 Cal. App. 2d 89, 103, 80 Cal. Rptr. 672 (1969). The time allowed by that Penal Code section for arraignment is two days or less after the arrest regardless of whether the arrest is made with a warrant or is warrantless. *Dragna v. White*, 45 Cal. 2d at 473.

In *Youngblood*, the court not only addressed the concept of promptness for arraignment, but it also decided the definition of "two days" provided for in Penal Code § 825 as well as the proper prearraignment treatment of arrestees. The court ruled that the legislative intent behind § 825 is that the "two day" arraignment requirement refers to "days" not "hours". "A defendant arrested at any time on Monday must be arraigned by Wednesday." *Id.* at 1313. Thus, the Riverside policy of a "48 hour" detention period prior to the arraignment is in direct conflict with the legislative intent with respect to that section.[19]

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[19]Although the evidence before the trial court was that the 48 hour analysis of *People v. Chambers* was used in Riverside County, the County now contends that it applies the "two court day" requirement of *Youngblood.* (Pet. Opening Brief, pp. 41-43, n. 12-13.)

Moreover the *Youngblood* court, consistent with *Dragna,* held that an unnecessary delay can occur prior to the maximum allowed two day delay for arraignment permitted by Penal Code Section 825 stating that the time period "[s]et forth in Penal Code Section 825 is not a limitation on 'necessary' delay. Thus, no unnecessary delay is permissible between the time of arrest and presentation to a Magistrate, *even if that presentation takes place within two days."* (Emphasis added.) *Id.* at 319.

Because a probable cause for arrest hearing is a substitute for a warrant ordinarily required by the Fourth Amendment to be issued prior to arrest, the urgency of a probable cause for arrest hearing is even greater than that for an arraignment. An arraignment is held only after the issuance of a complaint; such issuance is not one of the administrative requirements related to the arrest and, accordingly, the time required to obtain the complaint constitutes unnecessary delay with respect to the determination of probable cause for the arrest.

If, as California authority holds, two days is a maximum period permitted for the arraignment to take place and a shorter period may be required, it follows that the less complicated and more urgent requirements for a determination of probable cause for arrest may properly be found to be less than either the *Youngblood* two days or the *Chambers* 48 hours standard.

Amici Hawaii, *et al.*, makes the assertion that "... it is the majority view that the 'administrative steps' the police are permitted to complete prior to presentment include such matters as 'completing paperwork, searching the suspect, inventorying property, fingerprinting, photographing, checking for prior record, laboratory testing, interrogating the suspect, verifying alibis, ascertaining similarities to

other crimes, and conducting lineups.' " Brief of Amicus Curiae Hawaii, *et al.*, at p. 15. Such assertion is directly contrary to both the Fourth Amendment and *Gerstein v. Pugh*. In *Gerstein* this court noted that "[A] policeman's on-the-scene assessment of probable cause provides legal justification for asserting a person suspected of a crime, and for a brief period of detention to take the administrative steps incident to arrest." 420 U.S. at 113-114, 95 S.Ct. at 863. Those steps "incident to arrest" do not include an unlawful detention in order to garner evidence with which to retroactively create probable cause for arrest. 420 U.S. at 120 n.21, 95 S.Ct. at 866 n.21.

Applying the promptness standard of *Gerstein*, a number of federal courts have analyzed the particular time periods necessary to complete the "administrative steps" incident to arrest.[20] The wisdom of these cases becomes manifest in their analysis. The cases are fact specific.

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[20]These cases reach different results depending upon the exigencies of the local police departments. See, *e.g.*, *Moore v. Marketplace Restaurant*, 754 F.2d 1336 (7th Cir. 1985) (brief period of detention to take administrative steps "can be 4 hours if local facts justify it"); *Fisher v. Washington Metro Area Transit*, 690 F.2d 1133 (4th Cir. 1982) (24 hours sufficient to complete steps); *Sanders v. City of Houston*, 543 F. Supp. 694 (S.D.Tx. 1982) (24 hours); *Dommer v. Hatcher*, 427 F. Supp. 1040 (N.D. Ind. 1977) (24 hours); *Lively v. Cullinane*, 451 F. Supp. 999 (D.D.C. 1976) (2½ hours); *Mabry v. County of Kalamazoo*, 626 F. Supp. 912 (W.D.Mich. 1986) (60 hours unconstitutional); *Pallon v. Przybylski*, 822 F.2d 697 (7th Cir. 1987) (14 hours unconstitutional); *McGaughey v. City of Chicago*, 664 F. Supp. 1131 (N.D.Ill. 1987) (23 hours considered unconstitutional); *Llaguno v. Mingey*, 763 F.2d 1560 (7th Cir. 1985) (42 hours found unconstitutional); *Austin v. City of Grand Rapids*, 685 F. Supp. 1396 (W.D.Mich. 1988) (89 hours found unconstitutional); *Bernard v. City of Palo Alto*, 699 F.2d 1023, 1025 (9th Cir. 1983), (24 hours represent outer limits of constitutionality); *Kanekoa v. City and County of Honolulu* 879 F.2d 607 (9th Cir. 1989), (11½ hours might be unconstitutional).

What constitutes promptness in one area under a particular set of circumstances may well be delay in another. Rather than setting one overreaching standard that is completely unrelated to the local exigencies, *Gerstein* and its progeny look to exactly what time is needed by the local law enforcement agency to complete the administrative steps. *Gerstein* allows local agencies the unique opportunity to fashion their own destinies. Judge Gadbois recognized this when he refused to set a time period for the Riverside County branch jails. Riverside County is primarily rural. Rather than setting one standard for all parts within the county he entered an order requesting the "implementation of satisfactory procedures in this Riverside County branch jail as soon as practicable." (2 J.A. 332-333.)[21]

The County has not offered a single stitch of evidence showing why the "administrative steps" necessarily mandate a period of more than 36 hours. In fact all of the evidence, including the County's admission before this Court in its "Amicus" Brief, proves otherwise. The evidence that the County did submit showed quite graphically the benefits that result from proper probable cause for detention hearing. The declaration of Larry Smith (2 J.A. 181-185) is very helpful in explaining the benefits conferred upon the process by having prompt probable cause for detention hearings. In it, he reviews the court ordered procedures set up in Orange County as a result of Judge Gadbois' decision in *Scott v. Gates*, Civ. No. 84-8647 (C.D.Cal., Oct. 3, 1988). (1 J.A. 23.) In *Scott v. Gates*, Judge Gadbois issued an order virtually identical to that

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[21]The record is quite replete with information that the County could comply with the 36-hour time requirements. In fact, the district attorney for Riverside County admits that the system could be implemented. (2 J.A. 303, 304.)

in the instant action. (1 J.A. 22-23.) The totals for Orange County (2 J.A. 168-169) indicate that for 1987, 8.5% of the warrantless arrestees were released after a prompt probable cause hearing. That figure increased to 9.1% in 1988. (2 J.A. 168-169.) This is a significant number of releases considering that in 1988, 14,557 prisoners received probable cause for arrest hearings.[22]

The County also argues that the Riverside policy is constitutional because some of the warrantless arrestees are sometimes released within 24 hours (which, using their computation, does not include weekends or holidays (1 J.A. 81-83)). This argument is particularly specious, since so many are detained for significantly longer periods.

The declaration of the jail administrator again proves instructive on this issue. Of the 30 felony arrestee for whom "time" was computed, using the County's theory of not counting weekends as "time", the County's own survey for felony arrestees showed that 13 were kept over 24 hours (which could actually be over 72 hours); 11 over 36 hours (which could really be over 84 hours and 9 were over 48 hours (which could really be over 96 hours). (1 J.A. 80.) The County attempts to justify this without showing any administrative need for such lengthy periods of time.

In light of *Gerstein* and its progeny, Riverside's pretrial detention policy deprives plaintiffs of their Fourth Amendment right to a prompt hearing on probable cause for arrest.

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[22]These releases become even more important for prisoners of the Riverside County jail where on any given day over 234 prisoners out of 650 will not even have a bed to sleep in. (2 J.A. 318.) When they actually do get a bed the prisoners are *triple* bunked. (2 J.A. 319.)

VII. THE RIVERSIDE COUNTY PROCEDURES ARE COMPLETELY DIFFERENT FROM THOSE USED BY THE NEW YORK JUVENILE COURTS. THE PROTECTIONS PROVIDED BY THE NEW YORK PROCESS DO NOT EXIST IN RIVERSIDE COUNTY, *SCHALL V. MARTIN* THEREFORE IS INAPPROPRIATE.

The facts of this case are clear: a prisoner does not have counsel at the time he or she is informed by videotape of the right to some totally undefined hearing. For misdemeanants counsel is appointed at the next in court hearing. For felonies counsel arrives after the videotape is concluded. If the prisoners avail themselves of this attorney (with whom they have had a two or three minute relationship) the best the prisoner can expect is to have a probable cause hearing at the preliminary hearing ten days later. The prisoner has neither the benefit of counsel nor even a live person to respond to at the time he or she is informed of this vague, unclear, right. The prisoners are told of their rights while collected together in a noisy jail. They receive one sentence of information as to a substantial right, which is, as discussed previously, only a right to have a probable cause for detention hearing. The right is automatically waived by a failure to affirmatively request a hearing from a videotape. The present process in the Riverside County Jail provides no true benefits. It pales in comparison to the procedure used in Orange County. In Orange County, the prisoners get a prompt probable cause for arrest evaluation. This results in 9.1% of prisoners being released. In Riverside "[v]irtually every defendant waives this right." (Brief of Amicus Curiae Grover Trask, District Attorney, Riverside County, p. 8.)

The County claims that because the arraignment process is used as the touchstone for calculating timeliness

then somehow its procedures comply with the standards of *Schall v. Martin,* 467 U.S. 253, 104 S.Ct. 2403 (1984). The decision in *Schall* is simply not comparable. In *Schall,* there were substantial rights provided to the juveniles that do not exist in Riverside County. The New York statute was aimed at creating constitutionally permissible preventive detention for juveniles. 467 U.S. at 264, 104 S.Ct. at 2409. Under the New York procedure "notice, a hearing, and a statement of facts and reasons are given prior to any detention . . . ." *Id.,* 467 U.S. at 277, 104 S.Ct. at 2416. While the initial appearance before the magistrate prior to detention is informal, there is full notice of all charges and a complete stenographic record is kept. *Id.* The juvenile is accompanied by a parent or guardian; if a parent or guardian is not present the court must appoint a law guardian. *Id.* The juvenile is informed fully of his or her rights. The juvenile has counsel and receives written notice of the charges. Live testimony is taken. "Opposing counsel, the juvenile's parents, and the juvenile himself may all speak on his behalf and challenge any information or recommendation." 467 U.S. at 276, 104 S.Ct. at 2416. If detention is ordered, then, within three days, there must be "a formal, adversarial probable cause hearing" with the full panoply of trial rights including testimony under oath and cross-examination. 467 U.S. at 277, 104 S.Ct. at 2416. At the conclusion of this hearing, probable cause for detention must be ruled upon again in order to continue detention. As the Court in *Schall* noted: "[T]he FCA provides far more predetention protection for juveniles than we found to be constitutionally required for a probable-cause determination for adults in *Gerstein.*" 167 U.S. at 275, 104 S.Ct. at 2415.

When the procedure utilized by Riverside County is compared to that of New York, there is not a scintilla of similarity. None of the *Schall* protections exist for prison-

ers in the Riverside County jail. The County's reliance upon *Schall* is specious and unfounded in both fact and law.[23]

The record is quite clear that the Riverside County arraignment process provides no benefit. Further, such a process is not necessary for the "prompt" determination of probable cause as required by *Gerstein.* Riverside County's policies are unconstitutional.

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[23]The County also relies on *Williams v. Ward,* 845 F.2d 374 (2d Cir. 1988). Under the *Williams* facts warrantless arrestees are detained as long as 72 hours before they are provided with a probable cause hearing. The County argues that the Riverside detention policies comply with *Gerstein* as their policies follow that of *Williams.* There are a number of factual differences included in the *Williams* case which distinguish it from Riverside County. The record before the trial court in *Williams* was that only a small number of cases were rejected (13 out of 1407) as a result of lacking probable cause for arrest. 845 F.2d at 389 n.19. The trial court here had no evidence before it as to hearings in Riverside County, however it did have the Orange County experience, where the statistics ranged from 25% (1 J.A. 79-80) to 9.1% (2 J.A. 168) for release after prompt probable cause for arrest hearings. Further, in Riverside, felony warrantless arrestees can be detained as long as 17 days, which does not comply with *Williams* much less *Gerstein.* In addition the excessive detention time of *Williams* is factually unique to New York. In the lower court, respondents provided no evidence which showed that more than 24-36 hours are needed to complete the "administrative steps."

CONCLUSION

The underlying Circuit Court decision was correct. The plaintiffs had standing to sue. The County have violated, for a whole host of reasons, the standards set by this Court in *Gerstein v. Pugh*. This Court should uphold the rationale set forth in the lower Court.

Date: December 19, 1990

Respectfully Submitted,

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APPENDIX

California Penal Code

§ 825. The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays; provided, however, that when the two days prescribed herein expire at a time when the court in which the magistrate is sitting is not in session, such time shall be extended to include the duration of the next regular court session on the judicial day immediately following.

After such arrest, any attorney at law entitled to practice in the courts of record of California, may, at the request of the prisoner or any relative of such prisoner, visit the person so arrested. Any officer having charge of the prisoner so arrested who willfully refuses or neglects to allow such attorney to visit a prisoner is guilty of a misdemeanor. Any officer having a prisoner in charge, who refuses to allow any attorney to visit the prisoner when proper application is made therefore, shall forfeit and pay to the party aggrieved the sum of five hundred dollars ($500), to be recovered by action in any court of competent jurisdiction.

California Penal Code

§ 849. (a) When an arrest is made without a warrant by a peace officer or private person, the person arrested, if not otherwise released, shall, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person shall be laid before such magistrate.

(b) Any peace officer may release from custody, instead of taking such person before a magistrate, any person arrested without a warrant whenever:

(1) He or she is satisfied that there are insufficient grounds for making a criminal complaint against the person arrested.

(2) The person arrested was arrested for intoxication only, and no further proceedings are desirable.

(3) The person was arrested only for being under the influence of a controlled substance or drug and such person is delivered to a facility or hospital for treatment and no further proceedings are desirable.

(c) Any record of arrest of a person released pursuant to paragraphs (1) and (3) of subdivision (b) shall include a record of release. Thereafter, such arrest shall not be deemed an arrest, but a detention only.

California Penal Code

§ 859. When the defendant is charged with the commission of a public offense over which the superior court has original jurisdiction, by a written complaint subscribed under oath and on file in a court within the county in which the public offense is triable, he or she shall, without unnecessary delay, be taken before a magistrate of the court in which the complaint is on file. The magistrate shall immediately deliver to the defendant a copy of the complaint, inform the defendant that he or she has the right to have the assistance of counsel, ask the defendant if he or she desires the assistance of counsel, and allow the defendant reasonable time to send for counsel. However, in a capital case, the court shall inform the defendant that the defendant must be represented in court by counsel at all stages of the preliminary and trial proceed-

ings and that representation will be at the defendant's expense if the defendant is able to employ counsel or at public expense if he or she is unable to employ counsel, inquire of him or her whether he or she is able to employ counsel and, if so, whether the defendant desires to employ counsel of the defendant's choice or to have counsel assigned for him or her, and allow the defendant a reasonable time to send for his or her chosen or assigned counsel. The magistrate must, upon the request of the defendant, require a peace officer to take a message to any counsel whom the defendant may name, in the judicial district in which the court is situated. The officer shall, without delay and without a fee, perform that duty. If the defendant desires and is unable to employ counsel, the court shall assign counsel to defend him or her; in a capital case, if the defendant is able to employ counsel and either refuses to employ counsel or appears without counsel after having had a reasonable time to employ counsel, the court shall assign counsel to defend him or her. If it appears that the defendant may be a minor, the magistrate shall ascertain whether that is the case, and if the magistrate concludes that it is probable that the defendant is a minor, he or she shall immediately either notify the parent or guardian of the minor, by telephone or messenger, of the arrest, or appoint counsel to represent the minor. The prosecuting attorney shall deliver to, or make accessible for inspection and copying by, the defendant or counsel, copies of the police, arrest, and crime reports, upon the first court appearance of counsel, or upon a determination by a magistrate that the defendant can represent himself or herself. If unavailable to the prosecuting attorney at the time of that appearance or determination, the reports shall be delivered within two calendar days. Portions of those reports containing privileged information need not be disclosed if the defendant

or counsel has been notified that privileged information has not been disclosed. If the charges against the defendant are dismissed prior to the time the above-mentioned documents are delivered or made accessible, the prosecuting attorney need not deliver or make accessible those documents unless otherwise so compelled by law. The court shall not dismiss a case because of the failure of the prosecuting attorney to immediately deliver copies of the reports or to make them accessible for inspection and copying.

California Penal Code

§ 859b. At the time the defendant appears before the magistrate for arraignment, if the public offense is a felony to which the defendant has not pleaded guilty in accordance with Section 859a, the magistrate, immediately upon the appearance of counsel, or if none appears, after waiting a reasonable time therefor as provided in Section 859, shall set a time for the examination of the case and shall allow not less than two days, excluding Sundays and holidays, for the district attorney and the defendant to prepare for the examination. The magistrate shall also issue subpoenas, duly subscribed, for witnesses within the state, required either by the prosecution or the defense.

Both the defendant and the people have the right to a preliminary examination at the earliest possible time, and unless both waive that right or good cause for a continuance is found as provided for in Section 1050, the preliminary examination shall be held within 10 court days of the date the defendant is arraigned or pleads, whichever occurs later.

Whenever the defendant is in custody, the magistrate shall dismiss the complaint if the preliminary examination is set or continued beyond 10 court days from the time of the arraignment or plea and the defendant has remained in custody for 10 or more court days solely on that complaint, unless either of the following occur:

(a) The defendant personally waives his or her right to preliminary examination within the 10 court days.

(b) The prosecution establishes good cause for a continuance beyond the 10-court-day period.

For purposes of this subdivision, "good cause" includes, but is not limited to, those cases involving allegations that a violation of one or more of the sections specified in subdivision (a) of Section 11165.1 or in Section 11165.6 has occurred and the prosecuting attorney assigned to the case has another trial, preliminary hearing, or motion to suppress in progress in that court or another court. Any continuance under this paragraph shall be limited to a maximum of three additional court days.

If the preliminary examination is set or continued beyond the 10-court-day period, the defendant shall be released pursuant to Section 1318 unless:

(1) The defendant requests the setting of continuance of the preliminary examination beyond the 10-court-day period.

(2) The defendant is charged with a capital offense in a cause where the proof is evident and the presumption great.

(3) A witness necessary for the preliminary examination is unavailable due to the actions of the defendant.

(4) The illness of counsel.

(5) The unexpected engagement of counsel in a jury trial.

(6) Unforeseen conflicts of interest which require appointment of new counsel.

The magistrate shall dismiss the complaint if the preliminary examination is set or continued more than 60 days from the date of the arraignment or plea, unless the defendant personally waives his or her right to a preliminary examination within the 60 days.

California Penal Code

§ 991. (a) If the defendant is in custody at the time he appears before the magistrate for arraignment and, if the public offense is a misdemeanor to which the defendant has pleaded not guilty, the magistrate, on motion of counsel for the defendant or the defendant, shall determine whether there is probable cause to believe that a public offense has been committed and that the defendant is guilty thereof.

(b) The determination of probable cause shall be made immediately unless the court grants a continuance for good cause not to exceed three court days.

(c) In determining the existence of probable cause, the magistrate shall consider any warrant of arrest with supporting affidavits, and the sword complaint together with any documents or reports incorporated by reference thereto, which, if based on information and belief, state the basis for such information, or any other documents of similar reliability.

(d) If, after examining these documents, the court determines that there exists probable cause to believe that the defendant has committed the offense charged in the complaint, it shall set the matter for trial. If the court

determines that no such probable cause exists, it shall dismiss the complaint and discharge the defendant.

(e) Within 15 days of the dismissal of a complaint pursuant to this section the prosecution may refile the complaint.

A second dismissal pursuant to this section is a bar to any other prosecution for the same offense.

California Constitution Article 1 § 14

Felonies shall be prosecuted as provided by law, either by indictment or, after examination and commitment by a magistrate, by information.

A person charged with a felony by complaint subscribed under penalty of perjury and on file in a court in the county where the felony is triable shall be taken without unnecessary delay before a magistrate of that court. The magistrate shall immediately give the defendant a copy of the complaint, inform the defendant of the defendant's right to counsel, allow the defendant a reasonable time to send for counsel, and on the defendant's request read the complaint to the defendant. On the defendant's request the magistrate shall require a peace officer to transmit within the county where the court is located a message to counsel named by defendant.

A person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings.

California Constitution Article 1 § 15

The defendant in a criminal cause has the right to a speedy public trial, to compel attendance of witnesses in the defendant's behalf, to have the assistance of counsel for the defendant's defense, to be personally present with

counsel, and to be confronted with the witnesses against the defendant. The Legislature may provide for the deposition of a witness in the presence of the defendant and the defendant's counsel.

Persons may not twice be put in jeopardy for the same offense, be compelled in a criminal cause to be a witness against themselves, or be deprived of life, liberty, or property without due process of law.

United States Constitution, Article III

Section 1. The judicial Power of the United states, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Counsels; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a state shall be a Party, the supreme Court shall have original Jurisdiction.

In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulation as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed.

United States Constitution, Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

1. Record references in this form are to the volume (1 or 2) and the page number[s] of the Joint Appendix.

2. This plaintiff was originally named in the Second Amended Complaint as "Johnny E. Jones." (1 J.A. 2) On August 9, 1988, by court order, the name was corrected to "Johnny E. James." (2 J.A. 337).

3. The Riverside County Main Jail was originally rated by the Board of Corrections of the State of California to hold 357 prisoners. At the time of the injunction hearing there were only 416 beds in the prison, yet, there were over 650 prisoners in the facility. (2 J.A. 318)

4. According to the declarations of Judge Taylor, Presiding Judge of the Riverside Municipal Court (1 J.A. 121-121), and Lt. Peter Kiyasu of the Riverside County Sheriff's Department (1 J.A. 125), Public Defenders are only provided for felony arraignments. Contrary to the statements made in the Amicus Brief by the County of Riverside p. 8, there are no attorneys provided at misdemeanor arraignments.

5. The misdemeanor charged prisoners are told in the video that: "If you have any other questions about your rights, you should ask your attorney when you appear in court and discuss your matter with your attorney." (1 J.A. 123, 128.)

6. The hearing referred to is the preliminary hearing which is a probable cause for detention hearing, not a probable cause for arrest. (See Argument, Heading III, infra).

9. This figure is reached by taking the number of warrantless felony arrestees (46) and dividing it by 29, the number of persons held over 24 hours.

13. Similarly, in *O'Shea v. Littleton,* 414 U.S. 488, 94 S.Ct. 669 (1974), an injunctive relief action was not allowed because the Court assumed plaintiffs would not violate the law in the future. Here, plaintiffs have merely

been arrested without a warrant. Their innocence of any violation of the law is presumed.

14. It has been suggested by the County (Pet. Opening Brief, p.25) that the named plaintiffs could have sought habeas corpusrelief. This remedy also is incomplete and illusory. When a writ is issued, it usually affects only the individual plaintiff. It applies only to those persons "in custody." 28 U.S.C. granted for present detainees; it cannot be granted for unnamed, unknown, future warrantless arrestees not yet in custody. It does not eliminate the challenged policy, and therefore provides no relief for the class of future warrantless arrestees.

15. By this statement, the court made it quite clear it was addressing probable cause for detention. Since Penal Code Section 859b requires a preliminary hearing within ten days after the arraignment, the court found no need to approve a pretrial procedure allowing for a probable cause for continuing detention hearing for persons charged with felonies. *In re Walters,* 15 Cal. 3d at 752, n.8.

18. Judge Gadbois in conjunction with ruling that the California arraignment process is different from the *Gerstein* process (1 J.A. 11), was quite specific that he was not going to make any rulings on the California Constitution. He stated at the preliminary injunction hearing: "My only problem with your papers is that if you think I'm going to go roaming through the Penal Code of the State of California declaring everything in there unconstitutional, you're sorely mistaken." (1 J.A. 10.) He immediately reiterated that position: "The arraignment process does not. It clearly does not comport with *Gerstein.* I'll be happy to say that, if you give me some language to that effect. But don't tell me to declare the Penal Code of California unconstitutional. That's just a little much." (1 J.A.11.)

19. Although the evidence before the trial court was that the 48 hour analysis of *People v. Chambers* was used in Riverside County, the County now contends that it applies the "two court day" requirement of Youngblood. (Pet. Opening Brief, pp. 41-43, n. 12-13.)